No. 82-2056

IN THE

Supreme Court of the United States

October Term, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO and VISTA IRRIGATION DISTRICT,

Petitioners,

vs.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS OF MISSION INDIANS, and THE SECRETARY OF INTERIOR in his Capacity as Trustee for said Bands,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Introduction.

This petition was filed June 15, 1983. The Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts of the Flathead Irrigation Project, Montana, the American Public Power Association, and the Colorado River Conservation District and Kings River Conservation District have filed amicus briefs supporting the petition.

Respondents, the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands), filed a Brief in Opposition, and on September 21, 1983, the Solicitor General filed a Brief for the Federal Respondents[1] in Opposition.

The thrust of the opposition is that the case is not certworthy. Indeed the Solicitor ignored the merits altogether. The merits of the case are relatively easy. Justice Anderson's dissent adequately explains why the Ninth Circuit majority was wrong. This Reply corrects material misstatements and explains why the efforts to minimize the impact of this case are unsupportable and incorrect.

ARGUMENT.

I.

The Decision Below Affects Many Hydroelectric Projects.

The Bands attempt to minimize the impact of the Ninth Circuit decision by stating that only eight power projects "are located on Indian lands or adversely affect Indian water rights." (Bands' Opp. at 21.)

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[1]In fact, the Federal Energy Regulatory Commission (Commission) did not oppose the petition, but on June 28, 1983, requested the Solicitor General to file a petition. The Solicitor General obtained an extension of time until July 30, 1983, to file a petition (see Orders dated June 6 and July 8, 1983, *Federal Energy Regulatory Comm'n v. San Pasqual Band of Mission Indians et al.*, Docket A-970), but did not file one.

The Bands' reliance on a 1972 letter is misplaced. The letter, which listed eight projects[2] occupying Indian tribal lands or affecting Indian water rights, and twenty transmission line projects using Indian tribal lands, was non-comprehensive.[3] It also was written nearly twelve years ago. Since that date, the number of projects and project applications has dramatically increased,[4] and the Indians and Interior have taken a more aggressive posture with respect to Indian land, water and fishing rights. See, *e.g., Sierra Pacific Power Co. v. Federal Energy Regulatory Comm'n* (1982 9th Cir.) 681 F.2d 1134, 1136, cert. den. (1983) ___ U.S. ___, 51 U.S.L.W. 3756 (Pyramid Lake Paiute Tribe alleged that Sierra was operating without a license

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[2]Montana Power Co., Project 5; Northern States Power Co., Project 108; Escondido Mutual Water Co., Project 176; Moon Lake Electric Ass'n., Inc., Project 190; Portland General Electric Co., Project 2030; Arizona Power Authority, Project 2573; Southern California Edison Co., Project 120; Moon Lake Electric Ass'n, Inc., Project 1773.

The involvement of some of these projects with Indian Lands is a continuing source of controversy. See, *e.g., Montana Power Co., Project 5* (1983) 24 FERC ¶61,088 (Indians filed competing application for a new license); *Montana Power Company, Project 5* (1983) 23 FERC ¶61,464 (Indians petitioned to increase annual charges during period of annual licenses); *Portland General Electric Co., Project 2030* (1982) 20 FERC ¶61,294 (Indians awarded increased annual charges); *Southern California Edison Co., Project 120* (1981) 14 FERC ¶61,022 (licensee relieved of obligation to relocate certain telephone and transmission lines upon payment of $185,000 to Indians); *Northern States Power Co., Project 108* (1980) 13 FERC ¶61,055 (Controversy with Indians over new license for the project).

[3]The letter omitted project 2042 which uses allotted lands within the Calispel Indian reservation (*See Public Utility Dist. No. 1 of Pend Oreilles County, Washington* (1952) 11 FPC 786); and project 2149 which uses Colville Indian reservation tribal lands (*See Public Utility Dist. No. 1 of Douglas County, Washington* (1962) 28 FPC 128.) There may have been additional omissions. The last Commission Annual Report which listed licensees who paid annual charges for the use of Indian lands was in 1955. Eighteen of the Projects listed in 1955 (see 35 FPC Ann. Rep. 230-237 (1955)) were not mentioned in the 1972 letter.

[4]See Herron, "The rush is on to find new gold in falling water," 13 Smithsonian 87 (December 1982) (pointing out 1800 applications for hydroelectric projects were filed in 1981 compared to 18 in 1978).

and that the project interfered with the tribe's fishing rights); *Swinomish Tribal Community v. Federal Energy Regulatory Comm'n* (1980 9th Cir.) 627 F.2d 499, 506 (Swinomish Tribal Community, Upper Skagit tribe and Sauk-Suiattle tribe alleged that City of Seattle's project 553 interfered with treaty fishing rights); *Southern California Edison Co., Project No. 344* (1983) 23 FERC ¶61,240 (Agua Caliente Band of Mission Indians contended relicensing of project would interfere with its groundwater rights); *Pacific Gas & Electric Co., Project 77* (1983) 23 FERC ¶63,050 (Covelo Indian Community contended that relicensing of project would interfere with its fishing rights); *Public Utility Dist. No. 1 of Ferry County, Washington, Project 4471* (1982) 20 FERC ¶61,256 (Confederated Tribes of Colville Reservation opposed preliminary permit arguing that an 1891 agreement gave the tribes exclusive rights to use all water power in the area); *Washington Water Power Co., Project 2545* (1981) 15 FERC ¶61,039 (Coeur d'Alene and Spokane Indian tribes contended that the company lacked title to Indian land occupied by its project); *Pacific Gas & Electric Co., Projects 233, 2735* (1981) 14 FERC ¶61,179 (Pitt River Indians of California intervened in relicensing proceeding claiming "Indian Title" to the project lands); see also *Public Service Co. of New Mexico, Docket EL 79-18* (1980) 10 FERC ¶61,273 (Interior on behalf of the Laguna Indian Pueblo and the Canocito Band of Navaho Indians requested that the Commission exercise jurisdiction over a proposed pumped storage project alleging that the project would affect the quantity and quality of their groundwater). Regardless of what impact the Ninth Circuit decision might have had in 1972, it is clear that it will have serious and

widespread consequences today.[5]

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[5]A review of reported Commission proceedings during just the last five years has disclosed over 40 additional projects or proposed projects that are alleged to affect specific Indian lands, water or fishing rights. See, *e.g., Pacific Gas & Electric Co., Project 184* (1980) 13 FERC ¶62,269 (Pyramid Lake Paiute Tribe fishing and water rights); *City of Tacoma, Project 460* (1978) 3 FERC ¶61,033 (Skokomish Indian Tribe fishing and water rights); *Public Utility District No. 1 of Chelan County, Project 943* (1982) 21 FERC ¶61,264 (Yakima Indian Nation fishing rights); *Public Utility Dist. No. 1 of Okanogan County, Project 2062* (1983) 22 FERC ¶62,262 (Yakima Indian Nation fishing rights); *Public Utility Dist. No. 1 of Snohomish County, Project 2157* (1981) 17 FERC ¶61,056 (Tulalip Indian Tribe fishing rights); *Puget Sound Power & Light Co., Project 2494* (1978) 4 FERC ¶61,144 (Muckleshoot Indian Tribe fishing rights); *City of Seattle, Washington, Project 2795* (1979) 7 FERC ¶61,043 (Upper Skagit, Sauk-Suiattle and Swinomish Indian Tribes fishing rights); *City of Seattle, Washington, Project 2959* (1980) 13 FERC ¶61,010 (Tulalip Indian Tribe fishing rights); *Public Utility Dist. of Grays Harbor County, Project 3173* (1981) 15 FERC ¶62,074 (Quinault and Chehalis Indian Tribes fishing rights); *Cascade Water-power Dev. Corp., Projects 3427, 3867, 4136* (1982) 18 FERC ¶61,247 (Confederated Tribes of Umatilla Indian reservation fishing rights); *Roza Irrigation Dist., Projects 3484, 3485, 3486, 3487, 3488, 4172* (1981) 17 FERC ¶61,082 (Yakima Indian Nation water and fishing rights); *Kittitas County Public Utility Dist. No. 1, Projects 3489, 4207* (1981) 15 FERC ¶62,342 (Yakima Indian Nation water and fishing rights); *Yakima-Tieton Irrigation Dist., Project 3701* (1981) 17 FERC ¶61,171 (Muckleshoot Tribes fishing rights); *Mitex, Inc., Projects 3725, 4528, 4903* (1982) 20 FERC ¶62,255 (Blackfeet Indian reservation lands); *Mitchell Energy Co., Inc., Project 3733* (1981) 15 FERC ¶62,058 (Tulalip, Puyallup, Muckleshoot, Susquamish & Yakima Indian Tribes fishing rights); *City of Tacoma, Project 4014* (1981) 17 FERC ¶61,172 (Tulalip Indian Tribe fishing rights); *Mason County Public Utility Dist. No. 3, Project 4089* (1981) 15 FERC ¶62,365 (Skokomish Indian Tribe fishing rights); *Georgia Pacific Corp., Project 4158* (1981) 15 FERC ¶62,317 (Lummi Indian Tribe fishing rights); *Mason County Public Utility Dist. No. 3, Project 4217* (1981) 15 FERC ¶62,416 (Skokomish Indian Tribe fishing rights); *Mason County Public Utility Dist. No. 3, Project 4258* (1981) 15 FERC ¶62,362 (Skokomish Indian Tribe fishing rights); *Georgia Pacific Corp., Project 4286* (1981) 16 FERC ¶62,242 (Upper Skagit and Sauk-Suiattle Indian Tribes, and Swinomish Tribal Community fishing rights); *Consolidated Hydroelectric Inc., Projects 4261, 5178* (1983) 22 FERC ¶61,122 (Hoopa Valley Tribe's water and fishing rights); *Glacier Energy Co., Project 4437* (1982) 21 FERC ¶61,209 (Upper Skagit and Sauk-Suiattle Indian Tribes fishing rights); *Roza Irrigation Dist., Project 4890* (1983) 24 FERC ¶62,192 (Yakima Indian Nation water rights); *Ernest H. Altice, Project 5371* (1983) 23 FERC ¶62,040 (Yakima Indian Nation water rights); *Lawrence J.*

The Solicitor also attempts to minimize the effect of the Ninth Circuit decision, stating that "approximately" 17 projects are located *on* Indian reservations lands (Sol. Opp. at 17); however, he ignored the broad force of the Ninth Circuit decision which allows secretarial conditions to be imposed on projects *affecting* Indian reservations. As discussed above, there may be well over 150 such projects. Moreover, he completely ignores the hundreds of projects located on or affecting other federal reservations.[6]

He also implies that the Ninth Circuit's holding will have little precedential value because the Commission acted as if it were faced with an initial licensing as opposed to a relicensing. (Sol. Opp. at 15, 18) The Solicitor is wrong.

McMurtrey, Project 6307 (1983) 23 FERC ¶61,246 (Upper Skagit Indian Tribe, Swinomish Tribal Community, and Sauk-Suiattle Indian Tribe fishing rights); *Lawrence J. McMurtrey, Project 6338* (1983) 24 FERC ¶61,074 (Upper Skagit Indian Tribe, Swinomish Tribal Community, and Sauk-Suiattle Indian Tribe treaty rights); *Town of Skykomish, Projects 6396, 6525* (1983) 23 FERC ¶62,039 (Tulalip Indian fishing rights); *Graves, Arkoosh and Arkoosh, Project 6707* (1983) 23 FERC ¶62,195 (Shoshone-Bannock Tribe fishing rights); *City of Yakima, Project 6857* (1983) 22 FERC ¶62,425 (Confederated Tribes & Band of Yakima Indian Nation fishing rights); *Capital Dev. Co., Project 6982* (1983) 23 FERC ¶62,267 (Upper Skagit Indian Tribe, Swinomish Tribal Community & Sauk-Suiattle Indian Tribe fishing rights).

The alleged impact of projects on Indian fishing rights has become so prevalent that since 1978 the Commission has inserted language in over 100 additional preliminary permits requiring consultation with any Indian tribes whose fishing rights may be affected. See *e.g., Northern Wasco County People's Utility Dist., Project 7076* (1983) 24 FERC ¶62,138; *Chris Williams, Project 7111* (1983) 24 FERC ¶62,141; *Mason County Public Utility Dist., Project 7018* (1983) 23 FERC ¶62,240.

[6]The Bands also question the Commission's figure of 606 projects that utilize federal lands and reservations. (Bands' Opp. at 24 n. 19) The Commission's inability to file its own brief makes it impossible to verify that figure; however, its 1931 Annual Report (the last year in which the annual reports identified the type of lands affected by existing or proposed projects) listed 409 projects as affecting "national forests." See 11 FPC Ann. Rep. 213-240 (1931).

National forests are "reservations." (See FPA §3(2), 16 U.S.C. §796(2)), and would be subject to the Ninth Circuit's section 4(e) rulings.

The proceedings before the Commission were always treated as a relicensing. Since 1974 Mutual has operated the project with annual licenses issued under section 15(a). (Pet. App. at 44) During the proceedings the Commission rejected Interior's take-over recommendation under section 14 (Pet. App. at 109-16), and on rehearing determined net investment and severance damages. (Pet. App. at 312-27) Although by including Henshaw Dam the "project works" were expanded, the project, as such, did not change at all. The "new" (not "initial") license issued to Petitioners was "for the continued operation and maintenance of Escondido Project 176." (Pet. App. at 253)[7]

II.

Contrary to the Bands' Allegations the Commission Did Reject Secretarial Conditions Prior to 1975.

The Bands concede that in *Pacific Gas & Electric Co.*, (1975) 53 FPC 523, 526, the Commission rejected a secretarial condition imposed pursuant to the reservation proviso; however, they allege that this was not consistent with prior Commission practice. Their contention that prior to 1975 the Commission had never rejected conditions proposed by a secretary (Bands' Opp. at 20), is wrong. See, *e.g., Pacific Gas & Electric Co., Project 1962* (1947) 6

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[7]What, no doubt, confused the Solicitor was the Commission's section 4(e) discussion. The Commission inexplicably (and erroneously) indicated that section 4(e) applied because the action "is partly an initial licensing of the Henshaw facilities and partly a relicensing of the presently licensed Project 176 facilities . . ." (Pet. App. at 136). Since even applying the section 4(e) provisions, the Commission licensed the Petitioners' project, it was neither necessary nor appropriate, for the Petitioners to seek rehearing on that point. (See FPA §313(a), 16 U.S.C. 825l(a) (for a party to file a petition for rehearing, he must be "aggrieved") Petitioners did discuss the applicability of sections 4(e) and 15(a) in the Ninth Circuit brief supporting the Commission on the Interior veto issue. (See Brief for Respondent, Escondido Mutual, *et al.* at 66-74)

FPC 729, 730 (Commission rejected conditions "recommended" by Agriculture for the protection of fish); *Southern California Edison Co., Project 1930* (1949) 8 FPC 364, 367-68 (Commission rejected condition recommended by Agriculture to require a minimum water flow).

Contrary to the Bands' implication (Bands' Opp. at 20-21) the Commission continued its practice after the decision in *Lac Courte Oreilles Band v. FPC* (1975 D.C. Cir.) 510 F.2d 198. See, e.g., *Montana Power Co., Project No. 2301* (1976) 56 FPC 2008, 2011-12, (Commission rejected condition requested by Agriculture that a license term be limited to twenty years).

The Bands misstate the ruling in *Arizona Power Authority* (1968) 39 FPC 955 (Bands' Opp. at 18-19), by ignoring the Commission's rejection of a condition that would have required secretarial approval of changes in annual charges or use of Indian water. (39 FPC at 960)

In short, the Commission has several times[8] modified or rejected conditions proposed by various secretaries for inclusion in project licenses.[9] Until this case, the secretaries have acquiesced in the Commission's practice. Thus, the Ninth Circuit's holding effects a radical shift in power from the Commission to the various secretaries. Unlike in the past, where the various secretaries and the Commission compromised to balance competing interests (see Sol. Opp.

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[8]Commission reports are poorly indexed, making research difficult. Petitioners are confident, however, that had it been permitted to file its own brief, the Commission could have documented numerous other instances.

[9]In addition, in referring to opinions of the Secretary of Interior regarding the necessity of imposing certain conditions on licenses issued pursuant to §4(e), courts have spoken in terms of "recommended" (*Idaho Power Co. v. Federal Power Comm'n* (1965 9th Cir.) 346 F.2d 956, 958, cert. den. (1965) 382 U.S. 957), and "suggestion" (*Federal Power Comm'n v. Idaho Power Co.* (1952) 344 U.S. 17, 19, reh'g den. (1952) 344 U.S. 910).

at 19), the secretaries now will have no incentive to compromise.

III.

This Is an Appropriate Case in Which to Decide the Important Issues Raised by the Decision Below.

A. The Size and Nature of the Project Are Irrelevant.

The assertions that the project's power production is small[10] and its purpose is primarily for irrigation[11] (Bands' Opp. at 2, 26; Sol. Opp. at 2, 14, 19, 20) do not detract from the importance of the issues raised in the petition.

The litigation involving Project 176 has spanned more than twelve years and cost millions of dollars. Every issue has been fully litigated. The Reporter's Transcript of the Commission's proceedings fills 53 volumes containing 11,149 pages.

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[10]The comparison to power produced "by half a dozen modern automobiles" (Pet. App. at 13) is misleading. While at that time the Project's generating capacity was only 760 kilowatts (1018 horsepower), a hydroelectric plant can operate 24 hours a day, 365 days a year. For the period 1923-1970 project power generation averaged over 4,000,000 kilowatt hours per year, the equivalent of 6,340 barrels of oil or 37,800,000 cubic feet of natural gas. (Pet. App. at 96)

Much of the renewed emphasis on hydroelectric generation is on the use of small hydro plants similar to Project 176. See *e.g.*, Herron, note 4, *supra* (new small hydro projects at 2000 sites could add 45,000 megawatts of generating capacity (the equivalent of 45 nuclear power plants) by the turn of the century).

[11]Power production is incidental to many power projects in the West. See, *e.g.*, *City and County of Denver, Project 2035* (1951) 10 FPC 766, 768; *Turlock Irrigation Dist., Project 2299* (1964) 31 FPC 510, 562, *affirmed* (1965 9th Cir.) 345 F.2d 917, 920, cert. den. (1965) 382 U.S. 941; *Dep't of Water Resources of State of California, Project 2426* (1974) 51 FPC 529, 533. During a 1918 debate on the Federal Power Act, Congressman Raker emphasized the importance of irrigation in western water power projects when he stated:

> "I simply make again this assertion, that there is not a project constructed in the West, and there never will be one as long as the earth revolves as it does and the climate continues as it is, so that irrigation is necessary, when you build a dam for a reservoir, where from 50 to 90 percent of the construction will not be justified for irrigation alone." (56 Cong. Rec. 9911-12 (1918)

The three amicus briefs filed in support of this petition illustrate the widespread concern created by the Ninth Circuit's decision. More significantly, the Commission, the body charged with interpreting and applying the Federal Power Act, believed that review by this Court was warranted.

B. The Interlocutory Posture of the Case Is Irrelevant.

The contentions that this case is in an "interlocutory" posture (Bands' Opp. at 5; Sol. Opp. at 20) are irrelevant.

This case presents a worst-case scenario. If the Commission can be forced to accept Interior's conditions — conditions intended to destroy the project (see 6 FERC ¶63,008)[12] — it will have to accept every condition proposed by any secretary in the future, no matter how irrational or how parochial. The issue is not the reasonableness of Interior's conditions, but whether the Commission is bound to accept them regardless of their reasonableness. This issue will not be clarified on remand.

Nor will remand clarify the Ninth Circuit's MIRA §8 holding. The Commission will have to require Petitioners to obtain Indian consent for their project rights-of-way. It is certain that such consent will be withheld.

The pendency of the water rights litigation between the Bands and Petitioners is even more irrelevant. The outcome of that dispute will not affect the Ninth Circuit's section 4(e) and MIRA §8 holdings.

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[12]The Bands' assertion that Interior's proposed conditions were never found to be unreasonable, arbitrary or capricious when judged against whether they were "necessary for the adequate protection" of the reservations (Bands' Opp. at 3-4), is incorrect. The Commission found that Project No. 176 *as conditioned by it* neither interfered nor was inconsistent with the purposes for which the reservations occupied by the project were established. (Pet. App. at 174, 176)

Conclusion.

This case *is* cert-worthy and the Ninth Circuit's decision *is* erroneous.[13] If remanded, the Ninth Circuit's decision may well destroy project 176 — a project which the Commission found "best adapted to a comprehensive plan for beneficial public uses. . . ." (Pet. App. at 130) More importantly its decision could cripple all future hydroelectric development in the West.

This Court should return control in this vital area to the Commission, which unlike the Bands and Interior (see Pet. at 18) will, as Congress intended, base its decisions on broad national interests and policies that include "the kind of fairness, the kind of balancing of interests that normally goes on in the political process."

Dated: September 26, 1983.

Respectfully submitted,

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[13]In his brief, the Solicitor General did not discuss the merits. Petitioners are confident, however, that were it not for the conflict between Interior and the Commission (see Sol. Opp. at 14), the Solicitor would have agreed with Petitioners that the Ninth Circuit erred.

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